STATE OF MICHIGAN

COURT OF APPEALS

KEVIN MACLACHLAN, Personal Representative of the Estate of DAVID MACLACHLAN, Deceased,

Plaintiff-Appellant,

v

CAPITAL AREA TRANSPORTATION AUTHORITY, CITY OF LANSING, and JOHN DOE,

Defendants-Appellees.

UNPUBLISHED
January 20, 2005

No. 252221
Ingham Circuit Court
LC No. 02-001949-NI

Before: Jansen, P.J., and Murray and Donofrio, JJ.

PER CURIAM.

Plaintiff Kevin MacLachlan, as personal representative of the estate of David MacLachlan, deceased, appeals as of right the order granting defendants Capital Area Transportation Authority (CATA), City of Lansing, and John Doe, a CATA employee, summary disposition under MCR 2.116(C)(7). We affirm the portion of the trial court's order granting CATA and John Doe summary disposition on the basis of governmental immunity. But, we reverse the portion of the court's order granting the City of Lansing summary disposition.

The facts are undisputed for purposes of the appeal. Plaintiff's decedent, a forty-nine-year-old who suffered from mental and physical disabilities, was a daily passenger of the CATA bus system and used the bus as transportation between his residence and place of employment. Prior to December 15, 2000, Lansing had sustained multiple snowstorms with significant amounts of snowfall with temperatures consistently below freezing. At approximately 5:15 p.m. on December 15, 2000, decedent was a passenger on a CATA bus heading south on Pennsylvania Avenue. The bus driver stopped the bus at a designated CATA bus stop near the 5700 block of Pennsylvania Avenue, and decedent exited. The location of the stop and the surrounding sidewalks had not been cleared for several days and as a result of plowing were covered and mounded with several feet of ice and snow. After exiting the bus, decedent was trapped between the bus and the accumulated ice and snow that created a steep "wall." The

three-to-four-foot high "snow wall" made it impossible for decedent to leave the roadway which was being traveled by a high volume of traffic. Because he could not reach the sidewalk, decedent began walking north adjacent to the curb against the southbound traffic. An oncoming vehicle struck decedent and he later died.[1]

Plaintiff first argues that the trial court erred in granting CATA's motion for summary disposition, finding that plaintiff's claim was barred by governmental immunity. Plaintiff claims that CATA effectively denied that it was a municipal entity and, cannot, therefore, claim governmental immunity. Plaintiff further argues that even if CATA can assert governmental immunity, CATA is nevertheless liable under the motor vehicle exception because the activity of letting passengers on and off the bus constitutes "negligent operation" in that it is directly associated with the driving of a motor vehicle, the bus was still at the scene when the accident occurred, and CATA violated a Lansing ordinance requiring snow removal. We disagree.

A trial court's ruling on a motion for summary disposition is reviewed de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). The applicability of governmental immunity is a question of law reviewed de novo. *Baker v Waste Management of Michigan, Inc*, 208 Mich App 602, 605; 528 NW2d 835 (1995).

Under MCR 2.116(C)(8), the legal basis of the complaint is tested by the pleadings alone. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). All factual allegations are taken as true and any reasonable inferences or conclusions that can be drawn from the facts are construed in the light most favorable to the nonmoving party. *Id*. The motion should be denied unless the claim is so clearly unenforceable as a matter of law that no factual development can possibly justify a right to recover. *Id*. A motion for summary disposition may also be raised on the ground that a claim is barred because of immunity granted by law. MCR 2.116(C)(7). The Governmental Tort Liability Act (GTLA), MCL 691.1401 *et seq*., "provides broad immunity from tort liability to governmental agencies whenever they are engaged in the exercise or discharge of a governmental function[.]" *Ross v Consumers Power Co* (*On Rehearing*), 420 Mich 567, 595; 363 NW2d 641 (1984); see MCL 691.1407(1). To survive a (C)(7) motion raised on these grounds, the plaintiff must allege facts warranting the application of an exception to governmental immunity. *Smith v Kowalski*, 223 Mich App 610, 616; 567 NW2d 463 (1997). Neither party is required to file supportive material; any documentation that is provided, however, must be admissible evidence. *Maiden*, *supra*, 461 Mich 119. Therefore, when considering a motion brought under both MCR 2.116(C)(8) and (C)(7), it is proper for the court to review all the material submitted in support and in opposition to the plaintiff's claim. *Patterson v Kleiman*, 447 Mich 429, 431-435; 526 NW2d 879 (1994). The plaintiff's well-pleaded factual allegations, affidavits, or other admissible documentary evidence must be accepted as true and construed in the plaintiff's favor, unless contradicted by documentation submitted by the movant. MCR 2.116(G)(5); *Maiden*, *supra* at 119; *Smith*, *supra* at 616.

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[1] Plaintiff's claims against the driver of that vehicle were settled prior to the commencement of this case.

As an initial matter, there is no question that, as a transportation authority, CATA is a governmental agency entitled to governmental immunity. See MCL 691.1401(b) and (d). We note that although CATA initially stated in its responsive pleading that it neither admitted nor denied this fact, CATA later withdrew that response and admitted that it was a governmental agency on the record.

Plaintiff's contention that CATA violated Lansing City Ordinance No. 1020.06(a)[2] is plainly incorrect. This provision is inapplicable in the present case because CATA does not own or occupy any house, building, or lot in the area surrounding the bus stop.

When a governmental agency engages in a governmental function, "it is immune from tort liability, unless the activity . . . falls within one of the other statutory exceptions to the governmental immunity act." *Ross, supra* at 620, see MCL 691.1401(f). It is not disputed that defendants were engaged in a governmental function. The "motor vehicle" exception, which is to be narrowly construed, *Chandler v Muskegon Co*, 467 Mich 315, 320; 652 NW2d 224 (2002), provides that governmental agencies shall be liable for damage resulting from the negligent operation of a motor vehicle. MCL 691.1405. The term "motor vehicle" includes a bus. *Stanton v City of Battle Creek*, 466 Mich 611, 618; 647 NW2d 508 (2002).

The mere involvement of a motor vehicle is not sufficient to abrogate immunity. See *Peterson v Muskegon Co Bd of Road Comm'rs*, 137 Mich App 210; 358 NW2d 28 (1984). "Negligent operation" of a vehicle requires that the motor vehicle was "being operated *as* a motor vehicle," and the exception encompasses only activities that "are directly associated with the driving of a motor vehicle." *Chandler, supra* at 320-321; *Poppen v Tovey*, 256 Mich App 351, 355-356; 664 NW2d 269 (2003). "Operation" is more narrowly defined than "use," which "may also include a range of activity unrelated to actual driving." *Chandler, supra* at 320 n 7, quoting *Pacific Employers Ins Co v Michigan Mut Ins Co*, 452 Mich 218, 226; 549 NW2d 872 (1996). "Determining when, where, and how to drop off passengers are decisions concerning the 'use' of the bus[,]" – activities "unrelated to actual driving." *Chandler, supra* at 320 n 7.

> 'To be in operation, the vehicle must be in a 'state of being at work' or 'in the active exercise of some specific function' by performing work or producing effects *at the time and place the injury is inflicted*.' [*McNees v Scholley*, 46 Mich App 702, 706; 208 NW2d 643 (1973), quoting *Orlowski v Jackson State Prison*, 36 Mich App 113, 116; 193 NW2d 206 (1971), quoting *Chilcote v San Bernardino Co*, 23 P2d 748, 749 (Cal, 1933) (emphasis supplied by *McNees*).]

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[2] Lansing City Ordinance No. 1020.06(a) states:

> No person shall permit any snow or ice to remain on any sidewalk adjacent to any house, building or lot owned or occupied by that person, or on the sidewalk adjacent to any multifamily dwelling or unoccupied house, building or lot owned by that person, for more than twenty-four hours after the same has fallen or formed.

We no longer strictly apply the "time and place" requirement, however, because, "[t]he proper question, . . . is whether, under all the facts alleged by a plaintiff, the injuries suffered by the plaintiff may, in fact, be said to have resulted from the negligent operation of a motor vehicle." *Peterson*, *supra* at 213-214.

Even assuming that the bus was still present at the time the accident occurred, there was no allegation that the bus driver or CATA were negligent in the physical act of dropping plaintiff off at the designated bus stop. Designating a particular bus stop and failing to provide for an alternate stop are separate from the operation of the bus itself. The narrow construction of the motor vehicle exception in *Robinson v Detroit*, 462 Mich 439, 456; 613 NW2d 307 (2000), requires that plaintiffs' injuries "resulted from" the government-owned vehicle, i.e., that the vehicle was physically involved in causing plaintiffs' injuries while in operation as a motor vehicle. MCL 691.1405. Here, there was no such evidence. Decedent was not injured while on or exiting the bus, and the bus did not in any way physically cause Zapolski's vehicle to strike decedent as decedent walked in the roadway. The trial court did not err in granting summary disposition to CATA where, under a narrow construction of the motor vehicle exception, decedent's death did not result from the negligent operation of the CATA bus.

Plaintiff next argues that the trial court erred by dismissing plaintiff's gross negligence count against CATA bus driver, John Doe, when the discovery period was still open and discovery of this issue was not complete because plaintiff had not yet had a chance to depose CATA's executive director. Plaintiff further claims he was denied the opportunity to determine the identity of the bus driver or the circumstances that rendered the driver's conduct grossly negligent. He claims the court erred in finding that the bus driver was not grossly negligent because a reasonably prudent bus driver would not have dropped a passenger off at that location and/or warned the passenger of the danger posed.

If reasonable jurors could honestly reach different conclusions regarding whether conduct constitutes gross negligence, the issue is a factual question for the jury and summary disposition is precluded. *Stanton v City of Battle Creek*, 237 Mich App 366, 375; 603 NW2d 285 (1999), aff'd 466 Mich 611 (2002). However, if reasonable minds could not differ, the issue may be determined by summary disposition. *Id*.

The mere fact that the discovery period remains open does not automatically mean that the court's decision to grant summary disposition was untimely or otherwise inappropriate. Here, further discovery did not stand a fair chance of uncovering factual support for plaintiff's position. See *Dep't of Social Services v Aetna Casualty & Surety Co*, 177 Mich App 440, 446; 443 NW2d 420 (1989). We do not decide that the identification and the taking of the deposition of the bus driver could not stand a fair chance of producing more factual support that would bring plaintiff's allegations within the realm of gross negligence, which is required to impose liability on a government employee. MCL 691.1407(2); *Stanton*, *supra* at 374.

To be the proximate cause of an injury, gross negligence of a government employee that subjects him to liability must be "the one most immediate, efficient and direct cause" preceding

the injury.[3] *Robinson, supra,* 462 Mich 462. Assuming for the purposes of this opinion that the conduct of the bus driver did constitute gross negligence, that is but one of three causes that combined to be causative in bringing about decedent's injuries. Clearly, the one most immediate, efficient, and direct cause of decedent's death was the car striking him, and the next most direct cause of that event was decedent choosing to get off the bus at that particular location and begin walking down the road. The bus driver's conduct, again assuming gross negligence, while a cause of decedent's death, it was but one cause, and was therefore, not "the" proximate as required by *Robinson*. *Id*.

Accordingly, we conclude that the trial court did not err in granting summary disposition to John Doe, the bus driver. There was not a fair chance that further discovery would uncover any further facts that would support a finding that the bus driver's conduct was "the proximate cause" of decedent being struck by a vehicle.

Plaintiff's argument that the trial court erred in granting CATA's motion for summary disposition because plaintiff has a common law action against CATA based on CATA's status as a common carrier is without merit. The GTLA provides broad immunity for government agencies from tort liability unless the conduct falls within one of a few narrow exceptions. There is no recognized common carrier exception that would allow plaintiff to circumvent the immunity afforded by the GTLA.

Plaintiff argues that the trial court erred in granting the City of Lansing's motion for summary disposition because the city is liable under the highway exception when the wall of snow and ice was an unnatural accumulation. We agree.

The City of Lansing is a governmental agency that is immune from tort liability while engaging in a governmental function, unless one of the statutory exceptions applies. MCL 691.1401(b) and (d); *Ross, supra* at 620. A municipality's maintenance and repair of "highways," which includes sidewalks and public streets open to travel, constitutes the performance of a governmental function. MCL 691.1401(e); *Haliw v City of Sterling Heights*, 464 Mich 297, 303-304 n 7; 627 NW2d 581 (2001). However, § 2 of the GTLA sets forth the "highway" exception, which is to be narrowly construed. MCL 691.1402(1); MCL 691.1402a; *Nawrocki v Macomb Co Rd Comm'n*, 463 Mich 143, 156 n 14, 158; 615 NW2d 702 (2000).

Where a plaintiff pleads a cause of action in avoidance of governmental immunity, the first step of a two step analysis is satisfied. *Haliw, supra* at 304. There is no dispute that plaintiff has so pled in this case. The plaintiff must still prove the remaining elements of traditional negligence, the second step of the analysis. *Id.* Pertinent to the second step of the analysis are concepts such as the "natural accumulation" doctrine. *Id*. at 305. Under the long-recognized "natural accumulation" doctrine, "'a governmental agency's failure to remove the natural

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[3] See *Tarlea v Crabtree*, 263 Mich App 80, 92; 687 NW2d 333 (2004) stating that the defendants' conduct was not the proximate cause of the plaintiff's death due in part to heat stroke where the plaintiff had the option to not participate in a football-camp run or to stop and rest during the run.

accumulations of ice and snow on a public highway does not signal negligence of that public authority.'" *Id*., quoting *Stord v Transportation Dep't*, 186 Mich App 693, 694; 465 NW2d 54 (1991). When, however, the accumulation of ice and snow is the result of unnatural causes, the municipality may be liable. *Hampton v Master Products, Inc*, 84 Mich App 767, 770; 270 NW2d 514 (1978).

If there is any question regarding whether the condition was natural or unnatural, determination of this question of fact is within the province of a jury. *Whinnen v 231 Corp*, 49 Mich App 371, 377; 212 NW2d 297 (1973). Here, however, there is no dispute that the wall of ice and snow was created by the plowing efforts of the City of Lansing. Thus, reasonable minds could not differ on the fact that the snow wall was an unnatural accumulation. *Hampton, supra* at 772.

We recognize that a city should not be punished merely for removing snow from the roadway. *Skogman v Chippewa County Rd Comm'n*, 221 Mich App 351, 354, 356; 561 NW2d 503 (1997). However, a municipality can be held liable if in clearing ice and snow it "introduced a new element of danger not previously present, or created an obstacle to travel, such as a snow bank, that exceeds the inconvenience posed by a natural accumulation." *Id*. at 354. Here it is alleged that a wall of snow and ice, three-to-four-feet high and created by the defendant city, caused an unusual obstacle that increased the hazard to decedent. See *Id*.; *Hampton, supra* at 770. A jury may conclude that the city's act of piling ice and snow so high that it would be difficult, if not impossible, to traverse, introduced a new element of danger that exceeded the inconvenience posed by a natural accumulation. Plaintiff through his expert presented evidence that the city had adequate time to remove the snow wall from the bus stop and that it would not have been an unreasonable burden in light of the potential risk for the city to leave or create an opening in the piled snow to allow access to the sidewalk in an area designated as a bus stop. We accordingly conclude that plaintiff has created a justiciable question of fact relative to the alleged unnatural accumulation of ice and snow in the form of a snow wall and in avoidance of governmental immunity.

The portion of the trial court's order granting CATA and John Doe summary disposition is affirmed, but we reverse the portion of the court's order granting the City of Lansing summary disposition and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Kathleen Jansen
/s/ Christopher M. Murray
/s/ Pat M. Donofrio